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No. 87-2127

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL.,
APPELLANTS

v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME AND BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

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MOTION OF THE UNITED STATES SENATE FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME

For the following reasons, the United States Senate respectfully moves for leave to file the attached brief *amicus curiae*.

The Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." 2 U.S.C. § 288e(a) (1982). Appearing under this authority, the Senate has previously defended in this Court acts of Congress whose constitutionality has been challenged by the executive branch. *E.g.*, *Morrison v. Olson*, 108 S.Ct. 2597 (1988). In this appeal, the executive branch, depending on how issues of mootness, ripeness, and statutory interpretation are resolved, has questioned the constitutionality of an act of Congress.

Permission for the Senate to appear is of right and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). The brief for appellants was filed on December 29, 1988. The

brief for appellees is due to be filed by February 16, 1989. Under Rule 36.2 of this Court the brief of an *amicus curiae* shall be filed "within the time allowed for the filing of the brief of the party supported and if in support of neither party, within the time allowed for filing appellant's or petitioner's brief." The appellants are asking for reversal of the district court's judgment, while the appellees have moved to affirm that judgment. The brief which the Senate is seeking leave to file suggests to the Court that the appropriate disposition of this case is to vacate the judgment as moot in part and as unripe in part. Under the Court's rules our brief should have been filed by December 29, 1988, as it supports neither the disposition sought by the appellants nor the disposition requested by the appellees in their motion to affirm.

By law the Senate must agree to a resolution to authorize its Legal Counsel to appear in a case in the name of the Senate. 2 U.S.C. § 288b(c) (1982) ("The Counsel shall intervene or appear as amicus curiae . . . only when directed to do so by a resolution adopted by the Senate. . . .") The 100th Congress had already adjourned *sine die* when this Court noted probable jurisdiction on October 31, 1988. The brief for appellants was filed during the adjournment *sine die*. The 101st Congress convened on January 3, 1989. After swearing in new members, electing a President pro tempore, and undertaking other purely organizational activities on January 3, and joining the House of Representatives for the counting of the electoral ballots on January 4, the Senate adjourned until January 25, 1989. The resolution to authorize the Senate's appearance in this appeal, S. Res. 42, 101st Cong., 1st Sess., 135 Cong. Rec. S1161-62 (daily ed. Feb. 2, 1989) (text of resolution and statement of Sen. Mitchell), was acted on during the Senate's first full week of meetings in the 101st Congress.

The legislative calendar has been only one consideration. The principal factor governing the timing of this brief has been the need to develop a position on the issues

involved that accounts for the views of interested members of the Senate. Until that occurred, we could not present to this Court, as we are able now to do, a brief on behalf of the United States Senate. We have advised counsel for the parties in advance of the filing of this motion about the arguments that the Senate proposes to offer to the Court. Neither the appellants nor the appellees oppose the grant of our motion for leave to file.

Both the constitutional issues in this case, and the question of the need to decide them, are of considerable importance to the Senate. In the special circumstances described above, we request the opportunity to file the attached brief at this time.

Respectfully submitted,

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FEBRUARY 1989.

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BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

INTEREST OF THE UNITED STATES SENATE

If the merits were to be reached, this appeal would present a fundamental issue about Congress's authority to legislate a necessary and proper balance between the benefits of secrecy and the needs of an informed public and Congress in protecting the nation's security. Because the district court failed to give due weight to Congress's constitutional responsibilities, the United States Senate has a strong interest in reversal or vacation of the judgment invalidating section 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-391, 1329-432. As no case or controversy presently requires this Court to adjudicate the merits of this case, the interests of the political branches would be served best by the vacating of the judgment below so that it will not "spawn[ ] any legal consequences," *United States v. Munsingwear*, 340 U.S. 36, 41 (1950), governing the balance between them.

STATUTORY PROVISIONS INVOLVED

Section 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988, 101 Stat. 1329-391, 1329-432, was enacted as part of the Continuing Appropriations Resolution, 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987). Section 619 of the Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721, 1756 (1988), extends section 630 through Fiscal Year 1989. We will refer to them collectively as "section 630," which provides:

SEC. 630. No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:

(1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;

(2) contains the term "classifiable";

(3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;

(4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

(5) imposes any obligations or invokes any remedies inconsistent with statutory law: *Provided*, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

SUMMARY OF ARGUMENT

The district court grounded its invalidation of section 630 on an insupportably limited view of the national security powers that the Congress shares with the President. In performing its constitutional responsibilities the Congress has a great need for information from officials of the executive branch. As the judgment of the district court threatens to undermine the balance between the legislative and executive branches, we support appellants' constitutional arguments if it is necessary to reach the merits of this controversy.

The merits need not be reached, however. Disputes over the information that both political branches need to perform their constitutional responsibilities have been left historically to accommodation between the President and the Congress. Through the efforts of federal employees, their unions, the Congress, executive officials, and the district court in the companion cases, no present case or controversy necessitates a judicial determination of the fundamental issues that are otherwise presented.

1. The primary purpose of section 630 was to eliminate the uncertainty from nondisclosure agreements that had been caused principally by the vague term "classifiable." The President issued National Security Decision Directive 84 to require that every person with access to classified information sign a nondisclosure agreement. Although the President's directive applied only to disclosure of "classified" information, the implementing forms also prohibited the disclosure of "classifiable" information. Executive branch personnel objected to the vagueness of the term "classifiable," and unions of federal employees commenced actions to challenge its use. The Congress also focused on the term "classifiable" when it enacted section 630; subsection 2 of the measure specifically prohibited its use. The Congress was concerned that the term's vagueness would reduce the flow to the public and to the Congress of valuable nonclassified information.

2. The issuance of new agreements which do not contain the term "classifiable" has mooted the controversy over that term. In March, 1988, the Director of Central Intelligence issued Form 4355 to replace Form 4193 concerning the disclosure of information about, or derived from, sources and methods of intelligence. Then, in September, 1988, after the entry of the judgment below but before probable jurisdiction was noted in this Court, the Director of the Information Security Oversight Office issued Form 312. Neither form contains the prohibited term. The major problem which the Congress sought to address in enacting section 630 has been resolved.

3(a). Pursuant to subsection 1 of section 630, federal funds may be used to implement only nondisclosure agreements that concern information that is marked as classified or, if unmarked, is "known" by the employee who has signed the agreement to be classified or in the process of classification. The dispute about this requirement is not ripe. Appellants correctly observe that Congress enacted this requirement to make certain that federal agencies would not reintroduce the uncertainty that had been created by the vague term "classifiable." The new forms that have been issued without the term "classifiable" place a duty on employees to "consult" or "confirm" with other officials when they are uncertain about the classification status of information. On their face these modest and specific duties do not engender the great uncertainty that had been caused by the term "classifiable." A ripe controversy might arise only if the duty to "consult" or "confirm" is implemented in a way that re-creates the uncertainty in the scope of a federal employee's obligations that section 630 was intended to avoid.

3(b). A question under the remaining portion of section 630 arises, if at all, only if subsection 3 is read to bar the executive branch from requiring its employees to obtain authorization from superior officials prior to communicating classified information to the Congress. No ripe contro-

versy about the meaning or constitutionality of subsection 3 is presented on this appeal, however. No restriction on disclosures to the Congress appears on the face of the confidentiality agreements. Neither the complaints nor the affidavits of federal employees describe an instance in which, on the basis of a nondisclosure agreement, any federal employee has sought or been denied permission to provide classified information to the Congress. Furthermore, vacating for lack of ripeness would be consistent with the district court's dismissal for lack of ripeness of a similar claim that the nondisclosure agreements violate the Lloyd - La Follette Act, 5 U.S.C. § 7211, which protects the right of federal employees to petition the Congress.

4. Vacating the judgment will also serve to avoid involving the Court in the determination of unresolved political matters between the legislative and executive branches. The matters involved range from proposals for new legislation on whistleblowers to proposals for new legislation on executive reporting to the Congress about anticipated covert intelligence operations. The resolution of these sensitive matters is best left to the continuing process of communication and accommodation between the representative branches.

ARGUMENT

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE VACATED BECAUSE THERE IS NO PRESENT CASE OR CONTROVERSY

The district court's judgment that section 630 is unconstitutional is premised on a parsimonious view of the powers and responsibilities of the Congress. Against "the constitutional and traditional role of the Executive in assuring the nation's security and gathering and protecting the information essential to that security," J.S. 25a, the district court perceived only a limited congressional function. In its view, "[h]istorically, the role of Congress in this arena has been to facilitate secrecy with appropriate criminal and civil sanctions." *Id.* at 26a. Not surprisingly, the Congress begins with a different premise, that "the conduct of foreign policy [i]s a shared power between Con-

gress and the President." [1] The Constitution assigns significant national security powers to the President, but it also "confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors." [2]

If the district court's judgment were to stand, the delicate balance which now exists between the legislative and executive branches in carrying out their respective constitutional responsibilities concerning national defense and foreign policy would be seriously undermined. In exercising its responsibilities under the Constitution, the Congress has a great need for candid communications from executive branch officials and employees. It has mandated that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." [3] It has protected the right of each executive branch employee whose duties relate to foreign policy, such as members of the appellant association, to "express his views and opinions, and make recommendations he considers appropriate, if the request of the committee [of Congress] or member of the committee relates to a subject which is within the jurisdiction of that committee." [4] Consistent with these interests, we join the appellants' defense of the constitutionality of section 630.

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[1] *Report of the Congressional Committees Investigating the Iran-Contra Affair*, S. Rep. No. 216 and H.R. Rep. No. 433, 100th Cong., 1st Sess. 388 (1987).

[2] *United States v. AT&T*, 567 F.2d 121, 128 (D.C. Cir. 1977).

[3] 5 U.S.C. § 7211 (1982).

[4] 2 U.S.C. § 194a (1982). Protection for the candid expression of views by foreign service officers derives from the Foreign Relations Authorization Act of 1972, Pub. L. No. 92-352, § 502, 86 Stat. 489, 496. The Senate Committee on Foreign Relations explained that "[a]ll too often Executive Branch witnesses seem to be afraid to respond candidly to

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The mutual interests of the political branches in a balanced and effective government will not be advanced, however, by an adjudication of the merits of this case. Unlike other controversies in which the Court has decided disputes between the Congress and the President about the structure of constitutional government,[5] this appeal is not about the bold outlines of the separation of powers. Instead, this case addresses the shared interests of the executive and legislative branches in the information which each must have to perform its constitutional tasks. Over the long haul of our constitutional history the Congress and the President have resolved together questions about the sharing of information. Although they often disagree about access to facts and opinions, the President and the Congress recognize that they have a mutual interest in practical efforts to achieve accommodation.

Fortunately, a decision on the merits is avoidable as "the litigation has undergone a great deal of shrinkage since the decision[ ] below. . . ." *EPA v. Brown*, 431 U.S. 99, 103 (1977) (per curiam). As a result of the efforts of all the participants in this controversy—the individual feder-

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questions put to them for fear of departing in any way from official policy. This provision will give them statutory encouragement to speak frankly to the Committee." S. Rep. No. 754, 92d Cong., 2d Sess. 97 (1972). In 1973 the Congress expanded this protection from officers confirmed by the Senate to all employees of foreign affairs agencies. Department of State Appropriations Authorization Act of 1973, Pub. L. No. 93-126, § 17, 87 Stat. 451, 455; *see* 119 Cong. Rec. 19231 (1973) (remarks of Chairman Fulbright stating that measure is "another step to try to reestablish a proper relationship between Congress and the President on foreign policy matters").

[5] *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (officers of the Congress may not appoint officers of the United States); *INS v. Chadha*, 462 U.S. 919 (1983) (one House of Congress may not override the exercise of statutory authority by an officer of the United States); *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not delegate executive power to an officer over whom it has reserved the power of removal); *Morrison v. Olson*, 108 S.Ct. 2597 (1988) (Congress may assign to a court the power to appoint an independent prosecutor).

al employees who objected to vague terminology in earlier secrecy agreements, the unions that helped these employees present their grievances, the members of Congress who negotiated with the executive branch and sponsored hearings and legislation (on our side, Senators Grassley, Pryor, and Proxmire), the district court in the companion cases, and the executive branch officials who responded to the legislation and to the recent orders of the district court—the standard secrecy agreements have been amended to resolve the basic objection that had been lodged against them. The route to compliance may not have been as direct as possible, but Congress's primary objective in enacting section 630 has been attained. The harm that the district court's judgment might cause to the constitutional balance between the political branches may be avoided by vacating that judgment on the ground that the only ripe part of this controversy is now moot.

1. Congress Enacted Section 630 to Respond to the Executive's Use in Nondisclosure Agreements of the Term "Classifiable"

The President's goal in issuing National Security Decision Directive ("NSDD") 84 was to restrain the disclosure of "classified" information. J.A. 11. The directive was based upon an interdepartmental report about "unauthorized disclosures of classified information . . . [that] primarily occur through media 'leaks' by anonymous government employees, or in publications and statements by former employees." [6] On announcing the issuance of the NSDD in March, 1983, the Department of Justice stressed that "[t]he directive deals only with disclosures of *classi-*

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[6] *Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. 166 (1984) ("*1983-84 House Judiciary Comm. Hearings*") (text of report).

fied information." [7] During hearings held later in 1983 on other provisions of the NSDD, administration witnesses underscored their intent "not to interfere with the free flow of unclassified information to the public," while restating their view that there is "no . . . right of public access to classified information, and that is what the directive is designed to deal with." [8]

Although the President's directive addressed the disclosure of "classified" information only, Form 189, which was promulgated in August, 1983, to implement NSDD 84, and Form 4193, which had been prescribed earlier by the Director of Central Intelligence for sensitive compartmented information ("SCI"), also barred the disclosure of "classifiable" information.[9] A sustained controversy about the term "classifiable" did not occur, however, until a number of executive branch employees objected to the confidentiality forms when they were presented to them for signature several years later.[10]

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[7] *National Security Decision Directive 84: Hearing Before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 88 (1983) ("*1983 Senate Hearing*") (emphasis in original).

[8] *1983-84 House Judiciary Comm. Hearings, supra* note 6, at 77 (testimony of Dep. Ass't Att'y Gen. Richard K. Willard). Among the matters *not* covered by the report that preceded the issuance of NSDD 84 were "leaks of unclassified information." *Id.* at 166; *see also id.* at 170.

[9] J.A. 15 (Form 189, § 1); J.A. 19 (Form 4139, § 1). *See Prepublication Review and Secrecy Agreements: Hearings Before the Subcomm. on Oversight of the House Permanent Select Comm. on Intelligence*, 96th Cong., 2d Sess. 12 (1980) (CIA policy against disclosure of information "which is classifiable pursuant to law or Executive order but which, because of operational circumstances or oversight, is not formally classified by designation and marking").

[10] While several senators promptly questioned the use of the word "classifiable," *1983 Senate Hearing, supra* note 7, at 13-14, 20, 39-40 (Senator Eagleton); *id.* at 16-17 (Senator Levin), the Congress focused initially on issues presented by the NSDD's provisions on prepublication review and the use of polygraphs in leak investigations. Many federal employees were not asked to sign an agreement until several years after forms were promulgated. *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of*

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The declaration below of an Air Force atmospheric physicist gives this case, with the large issues that it has engendered, a specific mooring. H. Stuart Muench was presented with Form 189 in September, 1986, and was directed to return it in four days.[11] In order to limit his agreement to "information that is classified under the standards of Executive Order 12356," Muench struck "classifiable" from the form.[12] He was concerned, because Executive Order 12356, § 1.3(a)(6), allows classification of "scientific, technological, or economic matters relating to the national security," 47 Fed. Reg. 14,876 (1982), that the term "classifiable" would limit what he could say in "every paper, letter, talk, discussion" after leaving government.[13] After the Air Force initiated procedures to revoke his security clearance, Muench signed an unredacted Form 189 but appended a memorandum [14] indicating that he understood by reference to a Department of Defense pamphlet that " 'classifiable' refers to information that meets the criteria for classification under Executive Order 12356, but which has not yet been properly marked because of time limitations, oversight or error." [15]

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the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. 68 (1987) ("*1987 House Hearing*") (Information Security Oversight Office ("ISOO") fact sheet on status of Form 189) (1987); *id.* at 87-88 (Air Force first implemented procedures for the use of Form 189 in response to DOD directives in 1985).

[11] Opposition to Defendants' Motion to Dismiss, Exh. 3, Declaration of H. Stuart Muench at 1 (filed Nov. 20, 1987), *National Federation of Federal Employees v. United States*, C.A. No. 87-2284 (D.D.C.).

[12] *Id.* at 2 & Att. 2.

[13] *Id.*, Att. 2A.

[14] *Id.* at 4 & Att. 11.

[15] Opposition to Defendants' Motion to Dismiss, Exh. 4, DOD5200.1-PH-1, at 29. *See also* Supplemental Statement of Opposition to Defendants' Motion to Dismiss, Declaration of Louis C. Brase at 5 (¶ 2) (filed Jan. 12, 1988), *American Federation of Government Employees, AFL-CIO v. Garfinkel*, C.A. No. 87-2284 (D.D.C.) (objecting that term "classifiable" in secrecy agreements "must necessarily inhibit my free communication of *unclassified* information to Congress and the public") (emphasis in original).

The vagueness of the term "classifiable" became the central issue both in the district court and in the Congress. The National Federation of Federal Employees sought an injunction against any nondisclosure agreement "which prohibits the disclosure of 'classifiable' information," complaining that Form 189

> requires employees to speculate as to what should have been or could have been designated "classified." Speculation is not an appropriate condition of continuing employment or security clearance coverage. . . . The term "classifiable" is vague and overbroad. Out of fear of breaching the terms of SF-189, employees will not disclose information which is, in fact, legally disclosable.[16]

Senator Grassley, objecting to "vague, ambiguous and, in places, very unintelligible" language throughout Form 189, stated that "[t]he classic example of this problem is the term 'classifiable.' " [17]

Members feared that the vagueness of the term "classifiable" threatened to " 'chill[ ] or discourage[ ] the disclosure of any information which evidences waste, fraud, corruption or illegality in government . . . in contrast to and in derogation of the intended results of the whistleblowing statute.' " [18] The conferees emphasized that the administration's secrecy agreements oblige federal employees

> to safeguard not only information which is properly classified pursuant to executive order, but any

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[16] Complaint at 6, 4, 6 (filed Aug. 17, 1987), *National Federation of Federal Employees v. United States*, C.A. No. 87-2284 (D.D.C.); the union filed two amended complaints.

[17] *1987 House Hearing*, *supra* note 10, at 9.

[18] *Id.* (quoting American Law Division, Congressional Research Service, Memorandum on Effect of Secrecy Agreements on Whistleblowing Protections, July 28, 1987). That memorandum (reprinted in *id.* at 157-64) argued that "[t]he restrictions in the secrecy agreement on the disclosure of information which is not specifically classified under the Executive Order, but merely 'classifiable,' raise questions as to the consistency of the agreement with the whistleblowing protections of federal law. . . ." *Id.* at 160.

> information which may be considered to be "classifiable." This overbroad and ambiguous language results in a chilling effect on the first amendment rights of government employees, including their ability to communicate directly with members of Congress.[19]

The conferees understood that the primary purpose of section 630 was "to address the dubious concept of 'classifiable' information." *Id.*

2. Elimination of "Classifiable" From the Form Agreements Moots the Controversy About That Term

During a fourteen-month period beginning in August, 1987, executive officials, litigants, the Congress, and the district court all took steps to remedy the concerns of federal employees about the use of the term "classifiable." These efforts bore final fruit following the judgment of the district court when the Information Security Oversight Office issued a new form that omitted the disputed term.

Just prior to the plaintiffs' filing of the first of the actions consolidated below, administration officials sought to address the questions of federal employees about the term "classifiable" by explaining in the Federal Register that the term "classifiable" in Form 189 "refers to information that meets all the requirements for classification . . . but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information."[20] The forms themselves were not revised, however, and the published clarification failed to meet the objection that the term "classifiable" would deter officials from communicating nonclassified information to the Congress and to the public out of

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[19] H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). The importance of the conference report in understanding the intent of the two Houses is enhanced by the absence of an earlier report by a committee in either House.

[20] 52 Fed. Reg. 28,802 (Aug. 3, 1987) (to have been codified at 32 C.F.R. § 2003.20(h)).

fear that other officials would later decide that the material should have been classified.[21]

On December 21, 1987, the Director of the Information Security Oversight Office again revised the rules governing Form 189 in an effort to answer the concern about after-the-fact classification. The new regulation limited the prohibition in Form 189 against disclosure of "classifiable" information to "(a) [u]nmarked *classified* information, including oral communications; and (b) *unclassified* information that meets the standards for classification and is in the process of a classification determination."[22] In promulgating this change, administration officials took the first step toward resolving the controversy about the reach of the secrecy agreements, but they failed, as they had failed to do in August, 1987, to take the other necessary step of issuing revised forms that contained the limiting definition. The following day, December 22, 1987, Congress enacted section 630 to prohibit the enforcement of agreements which include in their text the word "classifiable."

The revision of the government's secrecy agreements occurred in two steps in 1988. First, prior to the district court's judgment invalidating section 630, the Director of Central Intelligence, on March 18, 1988, issued Form 4355 to replace Form 4193. The new form omits the term "classifiable." Instead, it defines the information covered by the agreement to be information that "involves or derives from intelligence sources or methods and is classified or is in the process of a classification under the standards of Executive Order 12356 or other Executive order or stat-

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[21] One union argued to the district court that "any definition outside the scope of the form itself could be changed by administrative fiat. It is plaintiff's position that the term 'classifiable' cannot be made legally sound by attempts to define it as something other than what it is on its face." Opposition to Defendants' Motion to Dismiss at 5 (filed Nov. 20, 1987), *National Federation of Federal Employees v. United States*, C.A. No. 87-2284 (D.D.C.).

[22] 52 Fed. Reg. 48,367 (Dec. 21, 1987) (to have been codified at 32 C.F.R. § 2003.20(h)) (emphasis in original).

ute." J.A. 54, ¶ 1. Then, following the July 28, 1988 ruling of the district court in the companion cases that had remained below,[23] the Director of the Information Security Oversight Office issued Form 312 to replace Form 189. As with the new SCI agreement, Form 312 omits the term "classifiable" and applies only to information that is classified or, if unclassified, "meets the standards for classification and is in the process of a classification determination." [24] Appropriated funds are no longer being used "to implement or enforce" any nondisclosure agreement that "contains the term 'classifiable.'" The major problem which Congress sought to solve in enacting section 630 has been remedied.[25]

This Court adheres to the principle that "[u]nder Article III of the Constitution, [it] may only adjudicate actual, ongoing controversies." *Honig v. Doe*, 108 S.Ct. 592, 601 (1988). Accordingly, "[t]he present rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed." *Id.* at 607 (Rehnquist, C.J., concurring).[26] Because there is no " 'reasonable expectation that the same complaining party would be subjected to the same action again,' " [27] the exception to the mootness rule for cases

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[23] Motion to Affirm at 4a-24a, *reprinting National Federation of Federal Employees v. United States*, 695 F. Supp. 1196 (D.D.C. 1988), *appeals docketed*, Nos. 88-5402 & 88-5404 (D.C. Cir.).

[24] J.A. 60; 53 Fed. Reg. 38,279 (Sept. 29, 1988) (to be codified at 32 C.F.R. § 2003.20(h)).

[25] Current executive branch employees who had signed Form 189 or Form 4193 have been notified of the narrowing of the definition of "classifiable," Brief of Appellants at 20, and of their opportunity to replace their old agreements with new ones which omit the disputed term. 53 Fed. Reg. 38,279 (Sept. 29, 1988) (to be codified at 32 C.F.R. § 2003.20(b)).

[26] *But see id.* at 608 (Rehnquist, C.J., concurring) (proposing exception to mootness rule when supervening event takes place after probable jurisdiction is noted or certiorari is granted). The issuance of Form 312 without the term "classifiable" occurred prior to the noting of probable jurisdiction.

[27] *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)).

that are "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), is unavailable.

The President's statement that section 619 (section 630's successor) "will be considered of no force or effect unless and until the ruling of the District Court is reversed by the Supreme Court" [28] furnishes no occasion to continue to litigate about the deleted term "classifiable." It is unlikely that the President intended to draw a distinction between the vacating and reversing of the district court's judgment; either result would leave intact the statute enacted by the Congress. Moreover, the notice published by the Director of ISOO explained that Form 312 had been issued without the term "classifiable" because it was "a preferred means" to deal with the ambiguities that had been perceived in the prior form. 53 Fed. Reg. 38,278 (Sept. 29, 1988). There is no basis for believing, and no suggestion has been made, that either the Director of ISOO or the Director of Central Intelligence would now discard that "preferred means" and revert to the ambiguities which had led to litigation and legislation. The judgment of the district court, insofar as it rests on subsection 2 of section 630, should be vacated as moot pursuant to *United States v. Munsingwear*, 340 U.S. 36 (1950).

3. No Dispute About Any Other Part of Section 630 Is Ripe for Review

Although disputes about the application of the remaining parts of section 630 may occur, no ripe controversy about subsections 1 and 3–5 exists to warrant a disposition of the merits of this appeal now that the principal dispute under subsection 2 over the term "classifiable" has been mooted.

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[28] 24 Weekly Comp. Pres. Doc. 1189 (Sept. 26, 1988); *see* Brief of Appellants at 20.

a. Potential Disagreements Over the Knowledge Requirement in Subsection 1 Do Not Present a Ripe Controversy

Under subsection 1 of section 630, no funds may be used to implement or to enforce nondisclosure agreements unless the agreements apply to information (apart from marked classified information) that is "unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination." [29] While the new nondisclosure forms are not limited expressly to unmarked information that is "known" by an employee to be classified or in the process of classification, the forms describe a consistent duty of employees to learn about the status of information. If during the remainder of this fiscal year this duty is enforced in a way which engenders the uncertainty that section 630 was designed to eliminate, a ripe controversy might be presented about subsection 1. Until then an adjudication about the subsection's meaning and constitutionality would be premature.

The replacement forms that were issued after enactment of section 630 impose a duty on federal personnel to inquire when they are uncertain about the classification status of information. Form 4355 requires a signer to agree not to disclose to an unauthorized person information in the process of classification "that I know to be

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[29] As a preliminary matter, the congruity between the President's directive and the words utilized by Congress in subsection 1 makes it difficult to discern in them the basis for a constitutional conflict. The report on which the President based NSDD 84 eschewed any interest in addressing the "compromise of classified information through negligence." *1983-84 House Judiciary Comm. Hearings*, *supra* note 6, at 166; *see also id.* at 170-71. The President directed that persons who have "knowingly" made unauthorized disclosures be denied future access to classified information. J.A. 13 (§ 2(e)). The language employed by the Congress in subsection 1—that secrecy agreements may govern only marked classified information or unmarked information that is "known" by an employee to be classified or in the process of a classification determination—follows naturally from the President's order establishing the secrecy agreement program.

SCI." J.A. 55 (§ 3). An employee who has signed the agreement has the responsibility to "consult" with departmental authorities "to ensure that I know whether information or material within my knowledge or control that I have reason to believe might be SCI, or related or derived from SCI, is considered by such Department or Agency to be SCI." *Id.* Form 312 imposes the similar duty on each employee who signs it "that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it" to unauthorized persons. J.A. 67 (§ 3).

Based on their understanding that "[t]hrough the actual knowledge requirement, Congress sought to ensure that agencies would not resurrect the uncertainty surrounding the term 'classifiable,' " [30] appellants are concerned about an ISOO guideline that a person "may" be liable for disclosing classified information only if he or she knows or "reasonably should know" that the information is classified or in the process of classification determination.[31] But any immediate problem of uncertainty about the phrase "reasonably should know" has been ameliorated by describing to employees the specific measures which they should take: they should "consult" (Form 4355) or "confirm" (Form 312) when they are in doubt about the classification status of information.

Neither the purpose of section 630 nor the text of subsection 1 suggests that Congress intended to deny to the executive the power to require employees to take reasonable steps to learn whether information is classified or is undergoing a classification review, as long as they are not required to speculate about the actions of government

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[30] Brief of Appellants at 36. We agree with appellants that subsection 1 was passed in aid of subsection 2 and should be interpreted and applied in conjunction with that subsection's ban on the term "classifiable."

[31] *Id.* at 19–20, *citing* 53 Fed. Reg. 38,279 (Sept. 29, 1988) (to be codified at 32 C.F.R. § 2003.20(h)(3)).

classifiers.[32] The forms that have been issued since the enactment of section 630 seek both to eliminate uncertainty and to discourage willful ignorance by describing the duty of employees to ascertain the status of information with which they have been entrusted. Any interpretative problem that may be posed by a duty to "consult" or "confirm" is unlike the one that persuaded the Congress to prohibit the term "classifiable." The Congress's principal objection to the term "classifiable" was that it required employees to predict whether government officials would decide that previously unclassified material should have been classified. In contrast, a duty to "confirm" or "consult" obliges employees only to ascertain the present classification status of information; speculation is not required.

Neither Form 312 nor Form 4355 presents on its face an issue about compliance with subsection 1. Although a ripe controversy might be presented if, in the implementation of these forms, the uncertainty that section 630 sought to eliminate reemerges, no concrete dispute about

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[32] Indeed, one of the plaintiffs below, the American Federation of Government Employees, AFL–CIO, has advised this Court that "it is far from clear that § 630 is intended to preclude the Executive from taking disciplinary action against an employee who unknowingly but carelessly discloses unmarked information in the process of a classification determination." Brief for the American Federation of Labor and Congress of Industrial Organizations and the American Federation of Government Employees, AFL–CIO as *Amici Curiae* Supporting Appellants at 25–26.

The concern has been expressed that a duty to "consult" or "confirm" "will force would-be whistleblowers to have to ask their superiors about classification determinations. This would act to stop the whistleblower." *Congress and the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 21 (1988) (statement of Rep. Boxer). However, ISOO's regulations provide that nondisclosure agreements "do not supersede the provisions of section 2302, Title 5, United States Code, which pertain to the protected disclosure of information by Government employees." 53 Fed. Reg. 38,279 (Sept. 29, 1988) (to be codified at 32 C.F.R. § 2003.20(g)).

subsection 1 is unavoidably presented on the record that is now before the Court.

b. Neither Is the Potential Issue Under Subsection 3, About Prior Authorization for Disclosures to Congress, Ripe for Review

In ruling that section 630 is unconstitutional, the district court mentioned neither subsections 1 nor 2 but held that "[p]articularly offensive to the need for judicially manageable standards are subsections (3) through (5) of section 630." [33] We agree with the Solicitor General that the principal questions to be decided, if the merits are reached, are whether subsection 3 precludes the executive branch from requiring that officers and employees obtain authorization from their superiors before communicating classified information to members of Congress, and, if it does, whether subsection 3 is constitutional. *See* Motion to Affirm at 22-28.

There is no need, however, to decide that issue in this case. First, there is nothing on the face of the agreements which impels a resolution of these questions. The agreements permit disclosure to persons "authorized" to receive information, J.A. 55 (Form 4355, § 3); J.A. 67 (Form 312, § 3), but do not describe who is authorized. The agreements do not purport to exclude members of Congress from the universe of authorized persons. The question whether the approval of superior officials is required for the submission of classified information to the Congress implicates policies that are extrinsic to the nondisclosure agreements and would take this litigation far from its present field.

Second, both sides to this litigation have acknowledged the lack of concreteness pertaining to this issue in the

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[33] J.S. 26a. The district court did not indicate what it meant in this context by "judicially manageable standards." Normally, the "lack of judicially discoverable and manageable standards," *Baker v. Carr*, 369 U.S. 186, 217 (1962), would persuade a court to avoid, rather than to decide as it did here, an important question about the allocation of constitutional authority between the political branches.

record below. Thus the appellants have advised this Court that "[i]t would be particularly inappropriate for the Court to delimit the parameters of the rights protected by Section 630 here because this case does not concern a specific disclosure made by a federal employee to a Member of Congress." Brief of Appellants at 47. The Solicitor General has agreed that "the Court does not have before it any concrete instance in which an employee has sought but been denied authorization to disclose information to a Member of Congress or has been disciplined or denied further access to classified information because he made such a disclosure without seeking or obtaining prior approval." Motion to Affirm at 27.

Appellants argue persuasively that "[r]ather than decide the respective rights of Congress and the Executive Branch in a vacuum, the Court should leave resolution of future disputes to political negotiations between the branches or to judicial determinations in concrete settings where political accommodation does not fully resolve the conflict." Brief of Appellants at 47. The Solicitor General, with equal persuasiveness, argues that equitable relief should be withheld because the "profound separation-of-powers concerns" that have been raised are being presented "in an exceedingly abstract and speculative context." Motion to Affirm at 27.

Third, vacating the district court's judgment about subsections 3 through 5 for lack of ripeness would be consistent with that court's dismissal of a claim that the confidentiality agreements conflict with the Lloyd - La Follette Act, 5 U.S.C. § 7211. Motion to Affirm at 21a. Section 7211 provides that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." On dismissing that claim, the district court held that plaintiffs must allege that they "have disclosed or intend to disclose some classified or classifiable information to Congress and have been

threatened with enforcement of the nondisclosure agreements. No such allegation appears in the complaint." Motion to Affirm at 22a.

The objective of subsection 3 is to protect rights that are established or recognized under section 7211 "to petition or communicate with Members of Congress." Just as the district court held that a claim under section 7211 should allege a specific impairment of an employee's right to communicate with the Congress, so a claim under subsection 3, which was enacted to implement section 7211, should allege actual communications to the Congress and actual threats to enforce nondisclosure agreements. The principle underlying the district court's dismissal of the claim under section 7211 establishes that the court should have avoided, for a commensurate lack of ripeness, ruling on the constitutionality of any aspect of section 630 beyond the now mooted issue under subsection 2.

Dismissal for lack of ripeness of these facial challenges to the form agreements is required by the principle that "[t]he power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947). Particularly in light of "the political nature of the questions presented" about the access of the executive and legislative branches to, and control over, information relating to national security and foreign policy, "the prior proceedings in the federal courts must be vacated, and the complaint dismissed." *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Rehnquist, J., concurring).

4. Vacating the Judgment Will Also Serve to Avoid Involving the Court in the Resolution of Open Political Issues Between the Representative Branches

Vacating the judgment below on grounds of mootness and unripeness not only would be faithful to this Court's

general principles of restraint but also would serve, in this extraordinary context, to avoid involving the Court in the resolution of significant political matters that are best left to the processes of continuing communication and accommodation between the representative branches.

For example, consideration of whistleblower legislation in the 101st Congress has already commenced as a consequence of President Reagan's pocket veto of the Whistleblower Protection Act of 1988.[34] Congress and the new administration also may grapple with unresolved questions about requirements for executive reporting to the Congress of anticipated covert intelligence operations. Last year the Senate passed a bill to assure more timely notification to the Congress of covert operations.[35] During the Senate hearings on the bill, the administration stated constitutional objections based on its views of the exclusive powers of the President concerning national security.[36] In response, the Senate Select Committee on

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[34] 24 Weekly Comp. Pres. Doc. 1377 (Oct. 31, 1988); 135 Cong. Rec. S23 (daily ed. Jan. 3, 1989) (referral to Senate Committee on Governmental Affairs of message from the President transmitting proposed Whistleblower Protection Act of 1989); *id.*, S278-83 (daily ed. Jan. 25, 1989) (statements on introduction of S. 20, Whistleblower Protection Act of 1989). That measure concerns civilian whistleblowers. Last year the Congress enacted, and the President signed, strong military whistleblower protection as part of the National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 846, 102 Stat. 1918, 2027 (1988).

[35] Intelligence Oversight Act of 1988, S. 1721, 100th Cong., 2d Sess., 134 Cong. Rec. S2249 (daily ed. March 15, 1988) (passage). The bill implemented a recommendation made by the congressional committees which investigated the Iran-Contra affair. S. Rep. No. 100-216 and H.R. Rep. No. 100-433, at 423. The House Permanent Select Committee on Intelligence and Committee on Foreign Affairs reported comparable legislation, H.R. Rep. No. 705, Pts. 1 & 2, 100th Cong., 2d Sess. (1988), but the House did not complete action on the measure.

[36] *Oversight Legislation: Hearings on S. 1721 and S. 1818 Before the Senate Select Comm. on Intelligence*, 100th Cong., 2d Sess. 81-106, 127-52, 157-91 (1988) (testimony and materials submitted by Ass't Att'y Gen. Charles J. Cooper).

Intelligence reported to the Senate its views that the shared nature of presidential and congressional authority with respect to national security supports the constitutionality of legislation that requires the provision of information to the Congress. S. Rep. No. 276, 100th Cong., 2d Sess. 19-25 (1988). These are the very considerations that are offered by both sides in opposition to, or in defense of, section 630. A judgment by this Court on those issues in the highly generalized circumstances of this litigation could have a considerable impact on significant matters that the Congress and the President should be resolving directly with each other.

CONCLUSION

The judgment of the district court should be vacated in part as moot and in part as unripe.

Respectfully submitted,

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